MEDIATION

IN THE

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLUMBIA

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"The District Court is committed to making dispute resolution an effective and integral part of the administration of justice in this jurisdiction."

John Garrett Penn
Chief Judge[1]

INTRODUCTION

This pamphlet introduces litigants and attorneys to the Mediation Program of the United States District Court for the District of Columbia. The Mediation Program was created in 1989 to give litigants an opportunity to discuss -- with a trained, neutral third person -- the possibility of settling their dispute consensually, without trying the case in court. Mediation, while not appropriate in all cases, can offer numerous advantages over both formal litigation and direct negotiations in many situations. Mediation may, for example, lead to resolutions that are:

- faster
- less expensive
- more creative
- better able to address the underlying interests of all parties.

This booklet has a two-fold purpose: (l) to explain mediation to litigants and their counsel; and (2) to help counsel meet their obligations under Local Rule 206 to "meet and confer" early in the litigation process about whether mediation would be appropriate in particular cases.

[1]Please note that the Honorable Norma Holloway Johnson became Chief Judge of the United States District Court for the District of Columbia on July 22, 1997.

1. WHAT IS MEDIATION?

Mediation is an informal process in which a specially-trained neutral third person helps the parties in a lawsuit attempt to reach a mutually agreeable settlement. The mediation process involves one or more sessions in which counsel, litigants and the mediator participate and may continue over a period of time. *The mediator has no power to render a decision or dictate a settlement.* She or he can, however, help the parties improve communication, clarify interests and probe the strengths and weaknesses of their own and their opponents' positions. The mediator can also identify areas of agreement and help generate options that lead to a settlement.

2. HOW DOES A CASE GET INTO THE MEDIATION PROGRAM?

Voluntary participation. Participation in the District Court's Mediation Program is voluntary. Parties may request mediation or the presiding judge may suggest it at a status conference. If all parties consent, the judge issues an order referring the case to the Office of the Circuit Executive, where the program is administered. The referral may take place at any time while the case is pending.

Local Rule 206. Local Rule 206 requires counsel to meet, within 15 days after the defendant enters an appearance in a case, to discuss – among other things – whether mediation might be appropriate. In assessing the possibility of mediation, counsel must consider:

- their clients' goals and objectives;
- the status of any prior settlement talks;
- the potential timing of any referral to mediation;
- whether their clients might benefit from a neutral evaluation of the merits of the case; and
- whether mediation might result in cost savings or any other practical benefits.

Within 10 days following this meeting, the parties must submit a joint report to the Court describing their views on the application of mediation to their case and outlining the steps that might be taken to facilitate that process. The report must also tell the Court whether counsel discussed mediation with their clients before filing the report.

Thus, even if the presiding judge does not suggest that counsel consider mediation, Rule 206 requires them to do so.

3. WHICH CASES ARE ELIGIBLE FOR MEDIATION?

All civil cases in which parties are represented by counsel are eligible for mediation. Each case should be assessed on an individual basis to determine whether a referral would be appropriate.

4. WHAT MAKES A PARTICULAR CASE APPROPRIATE FOR MEDIATION?

Deciding whether a particular case has "mediation potential" is an art, not a science. Thinking about the factors listed below should help you make that determination:

Relationship between the parties. Do the parties in your case have a business or other ongoing relationship? If so, is this an incentive to try to resolve the problems that generated the lawsuit? Are emotions so high that the inter-vention of a third person would help the parties communicate?

Receptivity of the lawyers. Are the lawyers in the case receptive to the mediation process?

Reluctance to exchange information in direct negotiation. Can a mediator help the parties identify and exchange information that will enable them to begin serious settlement discussions?

Adequacy of a judicial remedy. Will a judicial ruling give the parties what they really want and need? In certain kinds of lawsuits, for example, the plaintiff may want an apology in addition to money damages. Courts generally do not order litigants to apologize. But some form of apology might be available through a mediation.

Divergent views about the value of a case. Do the parties have widely divergent views about the *value* of a case; that is, about what will happen if the case goes to trial? Would they benefit from a neutral evaluation of their case by a Court mediator who is an expert in this type of litigation?

Need for a precedent. Do one or more of the parties seek to establish a legal precedent and therefore require a judicial ruling? Government or institutional litigants may frequently be in this position. In such a case, mediation might *not* be appropriate.

Need for privacy. Do the parties want to avoid a public air-ing of their dispute? A case involving the break-up of a law firm or claims of sexual harassment might be examples.

Difficulty in fashioning a remedy. Has liability been established, leaving the Court with the sometimes more difficult problem of fashioning a remedy? Could a mediator help the parties in this task? Class-action employment discrimination cases often present this problem. In such cases the Court may have decided that the institution's past practices are unlawful but left it to the parties to craft injunctive relief for the future.

Need for mediation to resolve continuing disputes. Can a mediator help the parties agree upon a dispute resolution mechanism they can use *after* the lawsuit is settled to resolve disputes that flow from the lawsuit? For example, can a mediator help litigants in a class-action discrimination case devise a mechanism to be used to decide the monetary value of each class member's claims, once class-wide liability is established?

5. WHEN SHOULD MEDIATION OCCUR?

Cases can be referred to mediation at any point during the litigation process. There are no hard-and-fast rules about when intervention might be most useful. As with case selection, the best way to think about the *timing* of a referral is to consider a series of questions:

- Do the parties have *enough information* to engage in serious conversations about settlement?
- Are there *outstanding legal issues* that the Court must resolve before settlement talks can take place?
- Have *the parties' circumstances changed* in a way that would make settlement talks more productive than in the past?
- Has the *imminence of trial,* with its attendant costs, anxieties and potential for publicity, heightened the parties' interest in settlement?
- Has liability been decided? Could a mediator assist the parties in *devising a proposal for injunctive relief?*

Your answers to these questions should help you confirm whether mediation is appropriate and, if so, when it should take place.

6. WHO ARE THE MEDIATORS?

The mediators are members of the United States District Court Bar who are selected by the Court and trained by professional trainers to provide mediation services to litigants on a *pro bono* basis. The Court typically maintains a roster of approximately 150 mediators.

7. HOW IS A MEDIATOR ASSIGNED TO A CASE?

When a case enters the program, a member of the dispute resolution staff in the Circuit Executive's Office appoints a qualified mediator from the Court's roster. The staff welcome any suggestions or ideas counsel may have about the *type* of mediator who is likely to be most helpful.

Mediators with particular expertise in the subject-matter of the lawsuit are available if the judge and the parties believe a neutral evaluation of the case is needed. In such a case the mediator would not only assist the parties in identifying their interests and the options for settlement, she or he would also give them an informal, non-binding assessment of the merits of the action. That assessment may be given to each side privately or to all parties in a joint mediation session.

8. WHAT TAKES PLACE IN A MEDIATION?

A mediation typically begins with a joint meeting of all parties and their counsel and the mediator, held within three weeks of the mediator's appointment. During that session, each participant has the opportunity to voice his or her perception of the dispute and to ask questions. The mediator then meets with each party separately to explore the issues further and to suggest settlement options. Mediation may continue over a period of time, with additional joint or individual sessions. The mediator may also confer with the parties by telephone. The process ends when one of the following events occurs:

- the parties settle their dispute;
- the mediator and the parties conclude that further discussions would be fruitless; or
- the *mediation deadline* – a date that is established by the judge's order of referral – is reached.

9. KEY POINTS ABOUT THE MEDIATION PROCESS

Mediation in the U.S. District Court is based on the following principles:

- All mediation proceedings are *confidential*. Documents generated for the mediation are also confidential and may not be introduced during a subsequent trial should the case not settle. The judge who is assigned to the case is not told the identity of the mediator or given any information about what transpires during the mediation process.

- Counsel and parties *with settlement authority* must attend mediation sessions. Certain exceptions may be granted for institutional parties or if a party is a unit of government.

- At least seven days prior to the first mediation session, each party must give the mediator a mediation statement that outlines the key facts and legal issues in the case. *Mediation statements are not briefs and are not filed with the Court.*

- Unless the presiding judge indicates otherwise, referral of a case to mediation *does not stay* other proceedings in the case or alter applicable litigation deadlines.

- The parties may seek an extension of the Court-imposed *mediation deadline* by filing an appropriate motion. The motion may represent the mediator's views about whether an extension is advisable, but may not disclose the mediator's identity.

- The Office of the Circuit Executive monitors the progress of mediated cases on a confidential basis. *Questions or problems* arising during the course of a mediation may be brought to the attention of the dispute resolution staff by any party.

COMPLIANCE JUDGE

Information about the mediation is confidential and may not be disclosed to the presiding judge in any referred action. To protect confidentiality while at the same time preserving the Court's ability to ensure compliance with its dispute resolution policies and orders, the Court has designated one judge to serve as the Dispute Resolution Compliance Judge. Complaints that litigants have not complied in good faith with the Court's mediation guidelines or with a judicial order referring the case to the program must be brought to the attention of the Director of Dispute Resolution, who may then refer them to the Compliance Judge for appropriate action. *Litigants may not bring such matters to the attention of the Compliance Judge directly or to the attention of the judge who is presiding in the lawsuit.*

PROGRAM ADMINISTRATION

The District Court's Mediation Program as well as the Appellate Mediation Program in the United States Court of Appeals for the District of Columbia Circuit are administered by the Office of the Circuit Executive. The Office is responsible for assigning cases to qualified neutrals and providing parties with the proper notification and instructions. Attorneys in the Circuit Executive's Office also monitor the progress of cases, collect pertinent statistical information and serve as a resource for program mediators as they handle cases.

WHERE CAN I GET MORE INFORMATION?

CLERK'S OFFICE

The District Court Clerk's Office supplies copies of:

- The *Rules of the United States District Court for the District of Columbia*, including Local Rule 206 and the Court's mediation procedures
- *Mediation in the United States District Court for the District of Columbia*

OFFICE OF THE CIRCUIT EXECUTIVE

For information about using the Court's Mediation Program or about the procedures that apply once a case is referred, or for other information about dispute resolution, contact:

Director of Dispute Resolution
Office of the Circuit Executive
United States Courts for the District of Columbia Circuit
333 Constitution Avenue N.W.
Washington D.C. 20001
(202)216-7350